86-403

Supreme Court, U.S.
FILED
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CLERK

NO.

IN THE SUPEREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RICHARD EARL CRIBBS, SR. and SUE S. CRIBBS,

Petitioners

versus

STEWART ARNOLD HILL and ANN ELIZABETH HILL,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERIORARI

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QUESTION PRESENTED FOR REVIEW

MAY THE COURT SET ITS OWN INDEPENDENT VALUE, WHICH IS CONTRADICTORY TO THE COURT APPOINTED APPRAISER?

PARTIES

All parties in the proceedings in the Supreme Court of Alabama appear in the caption of this case.

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RICHARD EARL CRIBBS, SR. and SUE S. CRIBBS,

Petitioners

versus

STEWART ARNOLD HILL and ANN ELIZABETH HILL,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioners, RICHARD EARL CRIBBS, SR. and SUE S. CRIBBS, respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court to review the judgment of the Supreme Court of the State of Alabama rendered May 2, 1986, which judgment affirmed the Order dated September 13, 1985, in which the Plaintiff/Petitioners were ordered to pay to the Defendants/Respondents the sum of $36,101.75 for the two parcels of property

made the basis of this matter contrary to the appraised value and in violation of Code of Alabama, 1975, Section 35-6-102.

OPINIONS BELOW

The opinion of the Circuit Court, Tenth Judicial Circuit of Alabama, Bessemer Division, Case No. CV 84391C, is attached hereto in Appendix A, infra, pp. A1 through A6.

The opinion of the Supreme Court of Alabama, Case No. 85149, is attached hereto in Appendix A, infra, pp. A7 through A8.

JURISDICTION

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Title 28, Section 1257(3), United States Code.

CONSTITUIONAL AND STATUTORY PROVISIONS

A. United States Constituion, Amendment V:

> "No person shall . . . . . be deprived of life, liberty, or

property, without due process of law; . . . . . "

B. United States Constitution, Amendment XIV, Section 1:

". . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

C. Code of Alabama, 1975, Section 35-6-100:

". . . . Provided that the joint owners or tenants in common interested in purchasing such interests shall notify the court of same not later than 10 days prior to the date set for trial . . ."

D. Code of Alabama, 1975, Section 35-6-102:

"After the report of the appraisers or commissioners, the tenants in common or joint owners seeking to purchase the interests of those filing the petition shall have 30 days to pay into the court the price set as the value of those interests to be purchased."

STATEMENT OF THE CASE

Petitioners and Respondents are joint owners of two (2) parcels of property in

Jefferson County, Alabama.

Parcel I is a vacant lot that was purchased by the parties hereto to rent to the contractor that was constructing the Jefferson County Courthouse in Bessemer, Alabama. The rent was disbursed to the parties during the term of use, but after the lease payments ceased; the Petitioners had to make all of the remaining mortgage payments.

Parcel II was an old foundry that the parties purchased in 1980 and remodeled with the Respondents doing some work and the Petitioners furnishing material, men and machinery. The Petitioners made all mortgage payments on this parcel of property. This property was vacant until 1984 at which time it was leased by a corporation that Petitioners had a major interest.

The parties have had numerous transactions over these properties and numerous joint ventures, and the Petitioners have cosigned with Respondents on a note at Central Bank that Respondents have failed and/or refused to pay. The Petitioners have made all the payments on this indebtedness for Respondents.

Petitioners filed a Petition for Sale and Division of the joint owned properties and for an accounting of all monies paid for the benefit and credit of Respondents when the Respondents failed and/or refused to pay any of the indebtednesses owing on said properties.

The Circuit Court Court of Jefferson County, Alabama, Bessemer Division, appointed an appraiser, Mr. Joe Terry, Sr., to appraise the properties. He appraised Parcel I as having a value of $12,000.00

and Parcel II having a value of $175,000.00. The Petitioners did not file an objection to this appraisal made by Mr. Terry. Subsequently, the Court entered an Order valuing Parcel I as having a value of $8,700.00 and Parcel II a value of $133,000.00 and that the Petitioners owed to the Respondents the sum of $19,577.00; no credit was given for the monies expended by the Petitioners for the mortgage payments, other expenses incurred on the properties and any other monies paid for the benefit or use of the Respondents.

REASONS FOR GRANTING THE WRIT

The trial court erred by not accepting the values set by the Court's appointed appraiser, Mr. Joe Terry, Sr., when no objection was made to his compentency or to the value. Madison vs Lambert, 399 So2d 840.

The standards set in Madison vs Lambert, were not complied with in that there is nothing to substantiate any value other than the value set by the Court-appointed appraiser, Mr. Joe Terry. Sr.

Code of Alabama, 1975, Sections 35-6-100 to 35-6-104 mandates a sale in accordance with its provisions. Scott Paper Co. vs Griffin, 409 So2d 375.

Provision is also made for independent valuation and judicial supervision of the purchase and sale of these interests if the coowners cannot agree on a price. Jolly vs Knopf, 463 So2d 150 (Ala. 1985)

In Code of Alabama, 1975, Sections 35-6-100 to 35-6-104, it provides for an independent valuation judicial supervision of the purchase and sale of respective interests in property if the cannot agree on a price.

The procedure is that one party is to make an offer to purchase at a certain value (that value set by one or more competent real estate ppraisers, Section 35-6-101) and the other accepting that value or objecting to the value; with the Judge accepting both offer and acceptance.

Either party may object to the compentence of the appraiser or to the amount. The Code does not allow the Judge independently to reduce or increase the amount set by the appraiser without objection by one of the parties. To allow the Judge to alter the value would violate the equal protection provisions of the United States Constitution (14th Amendment) and the Alabama Constitution (Section 2, 6 and 22). The purchaser would have the option of paying the higher price or refusing while the seller would have no

remedy from the amount set by the reduction. This also would violate the due process provisions of the Alabama Constitution (Sections 6, 7 and 13) and the United States Constitution (5th Amendment) in that it would deny the seller of is property rights by reducing his sales price. By denying the seller the right to bid on the property at any amount less than that set by the appraiser, of which he has prior knowledge and acceptance, the statute is circumvented, the common law is circumvented; and the State of Alabama Constitution and United States Constitution is violated.

CONCLUSION

The petition should be granted to resolve the statute for the sell and division of cotenant properties and to insure the constitutional protections of

due process and equal protection to all parties of the sale.

Respectfully submitted,

Jesse W. Shotts

JESSE W. SHOTTS, Esq.

APPENDIX "A"

IN THE CIRCUIT COURT, TENTH JUDICAL CIRCUIT

OF ALABAMA, BESSEMER DIVISION

RICHARD EARL CRIBBS, SR. and SUE S. CRIBBS,

Plaintiffs

vs

STEWART ARNOLD HILL and ANN ELIZABETH HILL,

Defendants

CASE NO. CV 84-391C

ORDER

This matter was heard on this date on the Defendant's motion to purchase the interest of the Plaintiffs' in the property subject to this cause. The defendants were present and with counsel, but the plaintiffs, though being notified through their attorney of record, the Honorable Jesse W. Shotts, failed to appear. Testimony was presented and the Court does find and order as follows:

That defendants motion and offer is based upon 35-6-100 through 104, Code of Alabama, 1975.

That the property subject to the petition in this cause is two parcels of land which are described as follows:

PARCEL I

Lot 12, Block 242, according to the map of the City of Bessemer, as recorded in Map Book 2, Page 14 and 15, as recorded in the Probate Office of Jefferson County, Alabama, Birmingham Division. Situated in Jefferson County, Bessemer Division.

PARCEL 2

Lots 1, 2 and 3, in Block 392, according to Bessemer Coal, Iron and Land Co.'s Survey of the City of Bessemer as recorded in Map Book 2, page 72, in the Bessemer Division of the Probate Court of Jefferson County, Alabama. Said lots being formerly known as the

Northeast 150 feet of Block 3 of the Survey of Keith Village as recorded in Map Book 5, Page 20, in said Probate Office. The Survey of Keith Village being vacated by instrument recorded in Volume 271, Page 509 in said Probate Office.

That the parties are joint tenants or tenants in common in both parcels and that the property can not be equitably divided without a sale. That the parties acquired title to parcel one by virtue of a deed from E. C. Coston Company to Allied Development Corp. dated November 26, 1979. The parties to this suit are the sole share holders of Allied development and that corporation was dissolved in September of 1982. There is no outstanding indebtedness regarding this parcel. The parties jointly purchased parcel two from J. K. Edwards on

March 24, 1980, subject to a mortgage to Mr. Edwards in the amount of $44,000.00. Mr. Edwards is now deceased and the Court determines that as of October 1, 1985 the outstanding balance due to his estate on this mortgage is $30,342.50. This property is currently under lease to Alabama Alignment and Spring, Inc. which is owned by the Plaintiffs. Current monthly rental on that lease is $1,320.00.

The Court determines that the Plaintiffs are indebted to the Defendants in the amount of $19,577.00, which amount includes the defendants' share of the rental income on parcel two until October 1, 1985. This debt is not subject to any pending litigation other than the one before this Court.

Based upon the appraisals and other matters presented, the Court determines

that parcel one has fair market value of $8,700.00 and that parcel two has fair market value of $133,000.00. Deducting the existing indebtedness regarding parcel two leaves a net equity in both parcels in the amount of $111,357.50. (The plaintiffs' interst being valued at $55,678.75 and the defendants' interest being valued at $55,678.75)

Therefore, after credit given for the amounts plaintiffs owe defendants, the Court determines that in order to purchase plaintiffs' interest in both parcels subject to this suit, the defendants must, on or before October 10, 1985, pay into Court $36,101.75, to be disbursed to plaintiffs by further order of this Court.

The plaintiffs are then directed to execute deeds conveying their interests in both these parcels to the defendants and, should they fail to do so, the Court

retains jurisdiction of this matter to issue whatever orders may be appropriate, including an order directing the Clerk to convey the interests of the plaintiffs to the defendants.

When the interest of the plaintiffs in the property has been conveyed to the defendants then the defendants are directed to pay any remaining indebtedness regarding the outstanding mortgage on parcel two and to indemnify and hold harmless the plaintiffs from any claim or liability thereon. The interest thus conveyed in parcel two will be subject to the lease with Alabama Alignment and Spring, Inc.

The Court orders that each party shall pay their own attorney fees. Appraisal fee in the amount of $125.00 submitted by Mr. Joe Terry is taxed as an item of costs and costs are taxed one-half to the plaintiffs and one-half to the defendants.

Done and Ordered this the 13th day of September, 1985.

(Original executed by Judge Roger Halcomb, Circuit Judge)

ROGER HALCOMB, CIRCUIT JUDGE

IN THE CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF ALABAMA, BESSEMER DIVISION

RICHARD EARL CRIBBS, SR. and SUE S. CRIBBS,

Plaintiffs

vs

STEWART ARNOLD HILL and ANN ELIZABETH HILL,

Defendants

CASE NO. CV 84-391C

ORDER

Plaintiffs' motion to amend order of September 13, 1985 was filed on October 8, 1985. The motion does not request a hearing or oral argument. After considering the same, the Court finds that defendants' motion to purchase the interest of the joint owners was set for hearing by the Court on September 13, 1985 and all parties were notified. Neither plaintiffs nor their counsel appeared. The record reveals that when the plaintiffs failed to appear, the Court contacted their

attorney's office by telephone and was informed their attorney would not appear and had no objection to the motion being heard. Thereupon the Court took the testimony of the defendants and based upon that testimony rendered the Order of September 13, 1985. The plaintiffs' motion contained allegations which could have been raised in the hearing on September 13th for consideration by the Court, but which were not then presented as evidence under oath. Therefore the Court orders that the motion is denied.

Done and Ordered this the 18th day of October, 1985.

(Original executed by Judge Roger Halcomb)

ROGER HALCOMB, CIRCUIT JUDGE

THE STATE OF ALABAMA - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1985-86

Richard Earl Cribbs, Sr. and Sue S. Cribbs

85-149

v.

Stewart Arnold Hill and Ann Elizabeth Hill

Appeal from Jefferson Circuit Court

JONES, JUSTICE.

Affirmed on the authority of Valley Mining Corp. v. Metro Bank, 383 So. 2d 158 (Ala. 1980).

AFFIRMED.

Torbert, C.J., an Maddox, Shores, and Adams, JJ.

Concur.

A-11

OFFICE OF CLERK OF THE SUPREME COURT

STATE OF ALABAMA

MONTGOMERY

Re: 85-149

RICHARD EARL CRIBBS, SR., et al, Appellant

vs

STEWART ARNOLD HILL, et al, Appellee

You are hereby notified that the following action was taken in the above cause by the Supreme Court today:

xxxx Application for rehearing overruled.

No opinion written on rehearing.

Jones, J. - Torbert, CJ., Maddox, Shores and Adams, JJ., concur

5/2/86

bsa

(Original executed by Robert G. Esdale)

Robert G. Esdale, Clerk

Supreme Court of Alabama

Supreme Court, U.S.
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Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES

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ATTORNEY FOR RESPONDENTS
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RESPONDENTS' BRIEF IN OPPOSITION

Petitioners seek review of the judgments of the State Courts of Alabama. The Court of first instance here sought to be reviewed is the Circuit Court of the Tenth Judicial Circuit of Alabama, Bessemer Division. The Appellate Court here sought to be reviewed is the Supreme Court of Alabama.

Respondents oppose the Petition for Writ of Certiorari on two grounds:

1. *No Federal Question is Here Properly Presented*

No federal question was raised in the Alabama Court of first instance. As the Court of first instance noted in its Order (Pet. A-1)

> ". . . but the **plaintiffs**, though being notified through their attorney of record, the Honorable Jesse W. Shotts, **failed to appear.**"
> (emphasis ours)

On their Application for Rehearing before the Supreme Court of Alabama, Petitioners attempted to raise for the first time the Fifth and Fourteenth Amendments of the United States Constitution. The Supreme Court of Alabama was without the benefit of any record of the evidence that was before the trial Court. Petitioners made no effort to supply the Supreme Court of Alabama with a statement of the evidence as authorized by Rule 10(d) of the Alabama Rules of Appellate Procedure. Hence, no federal question has ever been properly raised or presented in either the Court of first impression or the Appellate Court of Alabama.

2. *There Has Been No Unconstitutional Application of the Procedural Statute (Sections 35-6-100 through 35-6-104, Code of Alabama, 1975)*

As to whether or not the Court of first instance was bound to accept the valuation of the Court appointed ap-

praiser, the Supreme Court of Alabama has answered in the negative as follows:

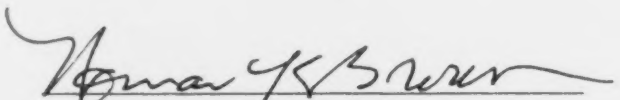
> Nothing contained in those statues prevents objection to the competence of the appraisers **or to the amount set by them as the values** of the interests to be purchased, as explained in **Madison,** supra. Should any such issues arise, the Court is not without authority to resolve them according to its traditional practice. (Emphasis Ours) **Gibbons v. Allen,** 402 So. 2d 914 (916)

Clearly then the Court was free to consider the Court appointed appraiser's report as well as other appraisals and evidence submitted by the Hills upon the hearing of their Application to Purchase. Such application of the Statute did not deny Petitioners due process or equal protection as guaranteed by both Federal and State Constitutions.

Petitioners have been afforded the constitutional guaranties of due process and equal protection of the law by the courts of Alabama, and while Petitioners may not have availed themselves to the fullest extent thereof, this Court should not now attempt to rectify Petitioners obvious dereliction.

Accordingly, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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Counsel of Record for
Respondents

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief in Opposition upon the Honorable Jesse W. Shotts and the Honorable Clifford Walker Norris, Attorneys of Record for Petitioners in this cause by placing the same in the United States mail, first class postage prepaid addressed to them at 2517 North 25th Avenue, Birmingham, Al. 35207, this 28 day of October, 1986.

Norman K. Brown

NORMAN K. BROWN